

## Department of Energy

## § 1023.9

not preclude the Presiding Administrative Judge from taking dispositive actions as provided in this Part or by agreement of the parties. Other persons acting as commissioners, magistrates, masters, or hearing officers shall have such powers as the Board shall delegate.

(b) Except as provided by law, rule, or agreement of the parties, contract appeals and other cases are assigned to a deciding panel established by the Board Chair consisting of two or more administrative judges.

(c) The concurring votes of a majority of a deciding panel shall be sufficient to decide an appeal. All members assigned to a panel shall vote unless unavailable. The Chair will assign an additional member if necessary to resolve tie votes.

### § 1023.8 Alternative dispute resolution (ADR).

(a) *Statement of Policy.* It is the policy of the DOE and of the Board to facilitate consensual resolution of disputes and to employ ADR in all of the Board's functions when agreed to by the parties. ADR is a core judicial function performed by the Board and its judges.

(b) *ADR for Docketed Cases.* Pursuant to the agreement of the parties, the Board, in an exercise of discretion, may approve either the use of Board-annexed ADR (ADR which is conducted under Board auspices and pursuant to Board order) or the suspension of the Board's procedural schedule to permit the parties to engage in ADR outside of the Board's purview. While any form of ADR may be employed, the forms of ADR commonly employed using Board judges as neutrals are: case evaluation by a settlement judge (with or without mediation by the judge); arbitration; mini-trial; summary (time and procedurally limited) trial with one-judge; summary binding (non-appealable) bench decision; and fact-finding.

(c) *ADR for Non-Docketed Disputes.* As a general matter the earlier a dispute is identified and resolved, the less the financial and other costs incurred by the parties. When a contract is not yet complete there may be opportunities to eliminate tensions through ADR and to confine and resolve problems in a way

that the remaining performance is eased and improved. For these reasons, the Board is available to provide a full range of ADR services and facilities before, as well as after, a case is filed with the Board. A contracting officer's decision is not a prerequisite for the Board to provide ADR services and such services may be furnished whenever they are warranted by the overall best interests of the parties. The forms of ADR most suitable for mid-performance disputes are often the non-dispositive forms such as mediation, facilitation and fact-finding, mini-trials, or non-binding arbitration, although binding arbitration is also available.

(d) *Availability of Information on ADR.* Parties are encouraged to consult with the Board regarding the Board's ADR services at the earliest possible time. A handbook describing Board ADR is available from the Board upon request.

### § 1023.9 General guidelines.

(a) The principles of this Overview shall apply to all Board functions unless a specific provision of the relevant rules of practice applies. It is, however, impractical to articulate a rule to fit every circumstance. Accordingly, this part, and the other Board Rules referenced in it, will be interpreted and applied consistent with the Board's responsibility to provide just, expeditious, and inexpensive resolution of cases before it. When Board rules of procedure do not cover a specific situation, a party may contend that the Board should apply pertinent provisions from the Federal Rules of Civil Procedure. However, while the Board may refer to the Federal Rules of Civil Procedure for guidance, such Rules are not binding on the Board absent a ruling or order to the contrary.

(b) The Board is responsible to the parties, the public, and the Secretary for the expeditious resolution of cases before it. Accordingly, subject to the objection of a party, the procedures and time limitations set forth in rules of procedure may be modified, consistent with law and fairness. Presiding judges and hearing officers may issue prehearing orders varying procedures and time limitations if they determine

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that purposes of the CDA or the interests of justice would be advanced thereby and provided both parties consent. Parties should not consume an entire period authorized for an action if the action can be sooner completed. Informal communication between parties is encouraged to reduce time periods whenever possible.

(c) The Board shall conduct proceedings in compliance with the security regulations and requirements of the Department or other agency involved.

### Subpart A—Rules of the Board of Contract Appeals

AUTHORITY: Pub. L. 95-91, sec. 301, 91 Stat. 577; Pub. L. 95-563; EO 10789.

SOURCE: 44 FR 64270, Nov. 6, 1979, unless otherwise noted.

#### § 1023.101 Scope and purpose.

The rules of the Board of Contract Appeals are intended to govern all appeal procedures before the Department of Energy Board of Contract Appeals (Board) which are within the scope of the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*). The rules, with modifications determined by the Board to be appropriate to the nature of the dispute, also apply to all other contract and subcontract related appeals which are properly before the Board.

[62 FR 24808, May 7, 1997]

#### § 1023.102 Effective date.

The rules of the Board of Contract Appeals shall apply to all proceedings filed on or after June 6, 1997, except that Rule 1 (a) and (b) of § 1023.120 shall apply only to appeals filed on or after October 1, 1995.

[62 FR 24808, May 7, 1997]

#### § 1023.120 Rules of practice.

The following rules of practice shall govern the procedure as to all contract disputes appealed to this Board in accordance with this subpart:

##### PRELIMINARY PROCEDURES

###### Rule

- 1 Appeals, how taken.
- 2 Notice of appeal, contents.

## 10 CFR Ch. X (1-1-05 Edition)

- 3 Docketing of appeals.
- 4 Contracting officer appeal file.
- 5 Motions.
- 6 Appellants election of procedure.
- 7 Pleadings.
- 8 Amendments of pleadings or record.
- 9 Hearing election.
- 10 Submission of appeal without a hearing.
- 11 Prehearing briefs.
- 12 Prehearing conference.
- 13 Optional Small Claims (Expedited) procedure.
- 14 Optional Accelerated procedure.
- 15 Settling the record.
- 16 Discovery—General.
- 17 Discovery—Depositions, interrogatories, admissions, production and inspection.
- 18 Subpoenas.
- 19 Time and service of papers.

##### Hearings

- 20 Hearings—Time and place.
- 21 Hearings—Notice.
- 22 Hearings—Unexcused absence of a party.
- 23 Hearings—Rules of evidence and examination of witnesses.

##### Representation

- 24 Appellant.
- 25 Respondent.

##### Decisions

- 26 Decisions.
- 27 Motion for reconsideration.
- 28 Remand from court.

##### Dismissals

- 29 Dismissals without prejudice.
- 30 Dismissal for failure to prosecute.

##### Sanctions

- 31 Failure to obey Board order.

##### PRELIMINARY PROCEDURES

Rule 1 Appeals, How Taken. (a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy of the notice shall be furnished at the same time to the contracting officer from whose decision the appeal is taken.

(b) Where the contractor has submitted a claim of \$100,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and where the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a claim in excess of \$100,000 to the contracting officer and the contracting officer has failed to issue a decision within a reasonable time,